

Nos. PD-0365-16 & PD-0366-16
TEXAS COURT OF CRIMINAL APPEALS

Nos. 11-14-00057-CR & 11-14-00058-CR

35th Judicial District Court

Brown County, Texas

FILED
COURT OF CRIMINAL APPEALS
6/18/2018
DEANA WILLIAMSON, CLERK

Michael Joseph Bien	§	Appellant
	§	
vs.	§	
	§	
State of Texas	§	Appellee

MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Michael Joseph Bien, Appellant in this cause, by and through his attorneys of record, Keith S. Hampton and Cynthia L. Hampton, and pursuant to Rule 79 of the Texas Rules of Appellate Procedure, files this *Motion for Rehearing*, and would show this Honorable Court the following:

This Court's new remedy is inadequate to deter and preclude violations of the Double Jeopardy Clause.

This Court's opinion in *Bien v. State*, ___ S.W.3d ___ (Nos. PD-0365-16, PD-0366-16, Tex.Crim.App., delivered June 6, 2018) resolved the issue whether the two offenses offended the Double Jeopardy Clause. However, this Court also empowered prosecutors – the same ones who violated double jeopardy – to decide which of their constitutional errors will benefit them the most. This remedy is contrary to every other construct

for resolving constitutional violations and provides no protection from multiple punishments for the same offense.

This Court has long held that it will not encourage the State to repeat a constitutional violation with impunity. *Harris v. State*, 790 S.W.2d 568, 587-88 (Tex.Crim.App. 1989)(prospect of repeated violations a factor in harmless error analysis). Yet this Court has now created a *per se* impunity power for the State. Under the *Bien* remedy, the State may both violate the Double Jeopardy Clause, then choose which of its unconstitutional punishments to preserve, once a reviewing court discovers its violation.

For all other constitutional violations, the State, as the beneficiary of the error, bears the burden of proving its harmlessness beyond a reasonable doubt:

[C]onstitutional error ... casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

Chapman v. California, 386 U.S. 18, 24 (1967) (citing 1 Wigmore, Evidence 21 (3d ed. 1940)). The new *Bien* remedy upends this principle of appellate review. The State is both the beneficiary of the constitutional violation and the master of the remedy.

The *Bien* remedy is also contrary to the remedy fashioned by the Supreme Court of the United States. The remedy is “to have the District Court exercise its

discretion to vacate one of the convictions.” *Ball v. United States*, 470 U.S. 856, 865 (1985). This remedy is appropriate to vindicate “the interest that the Double Jeopardy Clause seeks to protect[,] i.e., in the multiple punishments context, that interest is ‘limited to ensuring that the total punishment did not exceed that authorized by the legislature.’” *Jones v. Thomas*, 491 U.S. 376, 381-82 (1989)(quoting *United States v. Halper*, 490 U.S. 435, 450 (1989)). The Court held that “the state-court remedy fully vindicated respondent’s double jeopardy rights because the state court vacated one conviction and sentence and credited the time served under the other conviction.” *Id.* See also *Rutledge v. United States*, 517 U.S. 292 (1996)(remanding for trial court to set aside one conviction and the corresponding concurrent sentence).

No other state leaves it to the constitutional violator to choose its remedy. Contrary to *Bien*, the remedy for unconstitutional multiple punishment is not “a question to be answered by the prosecutor.” *Bien, supra* p. 17. It a remedy to be determined by the district court. Let the parties make their respective cases there. Accordingly, this Court should withdraw its original opinion, affirm the enforcement of the Double Jeopardy Clause with the remedy approved by the Supreme Court and remand this case with instructions to the district court to vacate one of the convictions.

Respectfully submitted,



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CERTIFICATE OF SERVICE: By affixing my signature above, I hereby certify that a true and correct copy of the foregoing *Appellant's Brief on the Merits*, was delivered electronically (via Efile and Serve) to Elisha Bird, Brown County Assistant District Attorney, at the following email address, elisha.bird@browncountytexas.org, on June 15, 2018.